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No.

In the

Supreme Court of the State of New York

October Term, 1972

— 71-1690

MARLENE K. KRESSE, et al.,

Petitioners,

v.

EARL L. BUTZ, Secretary of Agriculture of the United States,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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for the Ninth Circuit.

To the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioners, Marlene K. Kresse, et al., hereby petition for a Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case, and in support thereof does state as follows:

OPINIONS DELIVERED IN COURTS BELOW

The United States District Court for the District of Arizona, rendered an unreported opinion, a copy of which is appended to this Petition, (Appendix A Page 1a).

The Ninth Circuit rendered an opinion not yet reported, a copy of which is attached hereto (Appendix B Page 13a).

JURISDICTIONAL STATEMENT

The date of the Judgment of the Circuit Court is March 29, 1972, and the time of its entry is March 29, 1972.

The statutory provision believed to confer jurisdiction on this Court to review the Judgment in question is section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Does the express provision for Court review of regulated parties under the Agricultural Adjustment Act of 1937 (as amended at 7 USC §608(c)(15)), give rise to the inference that Congress intended to preclude consumer purchasers, a group whose interests are required to be protected under the aforementioned Act, from judicial review of an ultra vires marketing order which adversely affects the availability of a product and the cost thereof.

2. Do consumers after being allowed to participate as interested parties in a quasi-judicial regulatory hearing, have enforcible procedural rights under the Administrative Procedure Act, the Rules of the Department of Agriculture (7 CFR 900.16), and the United States Constitution in the formulation of marketing orders.

STATUTES AND REGULATIONS INVOLVED

Statutes:

Title 5, Section 554, United States Code

Title 5, Section 702, United States Code

Title 5, Section 704, United States Code

Title 7, Section 602, United States Code

Title 7, Section 608a, United States Code

Title 7, Section 608c, 5(G), United States Code

Regulations:

7 C.F.R., Section 900.8

7 C.F.R., Section 900.16

STATEMENT

When nonfat dried milk powder originating from other states enters the Phoenix, Arizona marketing area, it becomes subject to a compensatory taxing assessment promulgated by the Secretary of Agriculture (Appendix D Page 49a) under the claimed authority of the Agricultural Adjustment Act of 1937, as amended, [hereinafter referred to as the Act] (7 USC §608c 5A) (Appendix D Page 49a).

The Secretary has fixed the amount of the taxing assessment at the monetary difference between the fluid and surplus use prices fixed for the Arizona market (Appendix D Page 24), a method found by this Court to be prohibited by Congress, as a matter of law. (See *Lehigh Valley Cooperative* vs. *Freeman*, 370 U.S. 76, 84, 82 S.Ct. 1168, 1173 (1962).

This process results in a taxing assessment of $.17 per half gallon, which is equal to 40% of the retail price (Appendix D Pages 40a, 41a).

The Secretary defends the taxing assessment as necessary to compensate producers and handlers of fresh milk for an alleged

loss of fluid milk sales resulting from the entry into Phoenix, Arizona of nonfat milk powder for fluid use (Appendix D Page 49a).

Proceeds of the taxing assessment are presently distributed to the Carnation Milk Company, Shamrock Dairies, and the United Milk Producers of Arizona for payment over to their fresh milk farmers who serve the Phoenix area. (Appendix D Page 59a).

The Plaintiff residents of Phoenix are consumers of a product called "GO", one of whose ingredients is nonfat milk powder originating from unregulated areas of Minnesota, Wisconsin and Mississippi and thereby subject to the taxing assessment. (Appendix D Pages 39a, 40a).

Pursuant to the Administrative Rules of the Secretary, allowing interested persons to appear and participate in regulatory hearings, the Plaintiffs appeared at a hearing on "GO" which led to the contested taxing assessment. (Appendix D Page 43a).

After a two year wait the Secretary issued a Recommended Decision, then conferred ex-parte with proponents of the decision, reopened the hearing, broadened issues, joined the hearing with those for over 80 marketing orders in the United States, and scheduled the reopened hearing for Memphis, Tenn. — 1500 miles from the Plaintiffs residence. (Appendix D Page 49a).

The Plaintiffs did not participate in the ex-parte conferences and in fact protested them. (Appendix D Page 42a).

There can be no issue of fact on the existence of those conferences a portion of which are admitted. 1/

Thereafter the Secretary proceeded to convene the hearing and overruled the Plaintiffs request for cancellation of the hearing or recess to Phoenix, and issued a new Recommended and a Final Decision (See Appendix D Page 42a).

The Plaintiffs briefed and excepted to the action of the Secretary at each stage. (Appendix D Page 42a).

Prior to the effective date of the Regulation the Plaintiffs moved in the District Court of Arizona for and received a stay.

The Secretary moved to dismiss the complaint before answer and to dissolve the stay.

On argument the stay was dissolved and the action dismissed for lack of standing, although, the Court did so reluctantly in view of the Constitutional issues involved (Appendix A Page 8a).

The District Court decision was rendered before this Court's reversal of lower court decisions in *Barlow* v. *Collins*, 397 U.S.

1/ In reference to the reopened hearing, the Secretary stated in his findings that:

Prior to scheduling the hearing, the Department had received numerous expressions of concern from producer and handler groups about the possible competitive impact of filled milk and imitation milk on the existing structures of markets under Federal Order Regulation. In view of the widespread concern, the Department invited industry representatives to a series of public meetings. This was done to achieve the widest possible understanding of the problems before going to a hearing. The hearing notice opened for discussion all problems which the various parties had indicated in their proposals or in the public meetings to be related to filled or imitation milk under order regulation. Appendix D at page 49a.

159, 90 S.Ct. 832 (1970) and *Association of Data Processing Service Organ.* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970). However, the lower court decisions in those cases were referred to by the District Court in the instant case as the correct statement on the law of standing (Appendix A Page 10a).

Plaintiffs appealed to the Ninth Circuit Court of Appeals, which determined that while the Act did not expressly bar a consumers suit, and did affirmatively state that consumers were to be protected (7USC §602), that provision of the Act which provided for judicial review by handlers without mention of consumers, evidenced an intent to bar consumer actions. The Court further stated that nothing in the *Barlow* or *Data Processing* cases held to the contrary.

REASONS FOR GRANTING THE WRIT

The writ is sought on the grounds that:

1. There is a conflict between the Circuits as to the legal principles to be applied to suits by parties affected but unregulated by the Agricultural Adjustment Act of 1937, as amended.

2. Prior decisions of this Court have not been properly applied by the lower court.

3. Important questions are raised which only this Court can settle.

I

There is a conflict between the circuits as to the legal principles to be applied to suits by parties affected but unregulated by the Agricultural Adjustment Act of 1937 as amended.

At the present time, in both the Fifth Circuit (*Price* v. *Hardin*, 425 F.2d 1137 (1970), cert. den. 400 U.S. 1009, 91 S.Ct. 568 (1971), and the District of Columbia, (*Holm* v. *Hardin*, 449 F.2d 1009 (1971), the provisions of the Agricultural Adjustment Act (7 U.S.C. §608c (15)) providing for judicial review of marketing orders by regulated handlers, are not a bar to actions brought by a tomato wholesaler or a tomato importer. However, by reason of the within case, the opposite result holds true in the Ninth Circuit, which held in the instant case:

> Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c(15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope (Appendix B Page 20a).

This paradoxical situation was rationalized by the Ninth Circuit Court of Appeals as follows:

> *Nor do Harry H. Price & Sons, Inc.* v. *Hardin*, 5 Cir. 1970, 425 F.2d 1137 *cert. denied*, 400 U.S. 1009 (1970) or *Walter Holm & Co.* v. *Hardin*, D.C. Cir., 1971, 449, F.2d 1009, require a contrary result. There the Courts held that the plaintiffs, who were a tomato repacker and tomato importer respectively, had standing to challenge an administrative order promulgated by the Secretary under Section 608c. In *Price & Sons, Inc.*, it is not suggested that the Fifth Circuit would extend its holding to consumers. Furthermore, the court, which relied on *Data Processing* to reach its result, omitted any discussion of the question of whether the statute prevented judicial review; apparently the question was not raised.
>
> In *Walter Holm & Co.* the order challenged had a much more direct impact on the plaintiff than the order challenged here has on appellants. The plaintiff in *Walter Holm & Co.*

> was an importer of Mexican tomatoes, and attacked the Secretary's regulation limiting the size of such tomatoes. In holding that the plaintiff had standing to sue the court explicitly noted that although the appellant was not among the domestic handlers directly governed by the Secretary's order, he was nevertheless directly affected since the law, as administered by the Secretary, resulted in automatic import restrictions of importers. 449 F.2d at 1011. No such immediate link exists in the present case between the Secretary's order and the consumer appellants. Moreover as in *Price & Sons, Inc.*, there is no discussion of whether the statute prevented judicial review; apparently the question was not raised (Appendix B, Pages 20a, 21a).

It is respectfully submitted that the above stated grounds cannot be used to distinguish either *Price* v. *Hardin* or *Holm* v. *Hardin* from the instant case, for in both *Price* and *Holm* the question of whether the Agricultural Adjustment Act prevented judicial review by non-handlers, was placed directly in issue by the Government, but in neither case was this issue resolved in favor of the Government.

In the *Holm* case, the Government pointedly raised the alleged bar of the Act to an action brought by a tomato repacker and importer. The Government's brief to the Circuit Court of Appeals contained the statement that:

> Because only handlers are regulated, the administrative remedy of section 608c (15) (A) is expressly limited to a "handler subject to an order." Congress must have intended that judicial review which follows this administrative review be similarly exclusive.

A similar tact was followed by the Government in *Price*, and the lower court so recognized the Governments point:

> In the case before this Court it is clear that under the Agricultural Adjustment Act Price is not such a person as has been given the right to question an order or regulation.
>
> This review of cases involving standing clearly shows that plaintiff does not have standing under the Administrative Procedure Act. The regulations involved herein do not regulate Price. They apply to producers, handlers and

> importers. He is a repacker and wholesaler. At most they have an adverse affect on his business. Such effect, if it exists is not sufficient to confer standing under the clause in 5 U.S.C. 702 reading "adversely affected or aggrieved by agency action within the meaning of a relevant statute." As held in the cases cited this clause refers only to situations in which a particular statute expressly confers standing on a person who is adversely affected or aggrieved by agency action under that statute. Accordingly, it is clear that Price lacks standing to sue in this Action. *Price* v. *Hardin* 299 F. Supp. 557, 562 (1969)

The same point was urged upon the Circuit Court in the Government's brief on appeal and motion for rehearing. It was also presented before this Court as grounds for reversal on its petition for certiorari (denied by this Court at 400 U.S. 1009, 91 S.Ct. 568 (1971) wherein the Government contended that:

> In view of the express provisions for the administrative review of handler challenges to marketing orders, Congress could not have intended that such non handlers should be allowed directly to attack such orders in the Courts. Rather, a consideration of the Act as a whole shows that the judicial review provisions of 7 U.S.C. 608c (15) (B) were meant to be exclusive.

From the above it can be observed that the Government did in fact raise (before the other Circuits) those provisions providing for judicial review under the Agricultural Adjustment Act, as a bar to suits by non-regulated parties.

In the *Holm* case, the Government's brief also urged a two step evaluation of the right to standing by unregulated parties, which evaluation it derived from *Data Processing* (supra) and *Barlow* v.

Collins (supra). 2/ The question of whether the absence of judicial review in the Act stood as a bar to standing, was included in the second step.

This two step approach to standing which included the Act as a bar was followed by the 5th Circuit and the District of Columbia Circuit Courts. It is therefore apparent that while not discussing it as a separate step, the Court intended to resolve the issue.

A conflict between the Circuits therefore does exist and the matter of mechanics as to whether there are 2 steps including the bar of the review provision or 3 steps with the bar as a separate item does not change the fact that the Courts had the same issue before them and produced differing results.

We also direct the Court's attention to *Reade* v. *Ewing*, 205 F.2d 630 (2nd Circuit). This case gives consumers of margarine standing to sue under the Federal Food, Drug and Cosmetic Act which allows suit by adversely affected parties, a provision similar to the Administrative Procedure Act provisions.

2/ The Government brief urged on that circuit:

> In *Data Processing*, the Court announced a two-step inquiry which must be made to determine whether a particular plaintiff has standing to attack an administrative order: First, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" so as to satisfy the case or controversy requirement of Article III, 397 U.S. at 152; and second, whether the interest sought to be protected by the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constituional guarantee in question." 397 U.S. at 153. It is the resolution of the second question which requires an analysis of the statutory scheme in issue as "Congress can, of course, resolve the question one way or another." 397 U.S. at 154.

II

Prior decisions of this Court have not been properly applied by the Ninth Circuit.

This Court has laid down the principle that by reason of the Administrative Procedure Act, Section 10, Congress has provided for standing to sue for aggrieved parties unless in a local statute it has expressly withdrawn that right or unless there is clear and convincing evidence of an intent to withdraw that right (*Rusk* v. *Cort*, 369 U.S. 367, 82 S.Ct. 787 (1962)). Since the right to standing is a valuable right no presumption exists in favor of lack of standing and the tendency is to find standing unless Congress has clearly withdrawn the right. Such a withdrawal of the right to standing cannot be spelled out by provisions for judicial review for one class and omissions to allow judicial review for another. (*Abbott Laboratories* v. *Gardner*, 387 U.S. 138, 141, 87 S.Ct. 1507, 1511).

The lower court's opinion is squarely in conflict with these principles since it held that Congress' failure to provide for Administrative review by consumers evidenced an intent to deny judicial relief to consumers. (See infra page 12).

The lower court additionally found that the purposes of the Act raised an inference that consumers were not intended as beneficiaries. The lower court stated:

> Nor can it be said that Congress overlooked consumers, and that therefore it did not intend to exclude them from obtaining administrative and judicial review of the Secretary's orders. *The Act contains some pious platitudes about the interests of consumers.* See §§ 602(2)(3)(4), 608a(1). The primary purpose of the Act, however, is to protect the purchasing power of the farmers and the value of agricultural assets. (§601.) The whole scheme of the Act is to raise the prices of agricultural products to, and keep them at, levels fixed by the Secretary, and to establish "orderly" marketing of them. Bluntly stated, that means, in part,

> marketing freed to a very large extent from price competition. It is arguable that the immediate, and possibly the long-run, interests of consumers are contrary to these goals. It is not surprising that the Act is full of provisions for agreements between the Secretary and producers (§608b(2)), (608a(3)) or growers (608a(3)), processors (608b) and handlers (§608b), agreements which are exempt from the antitrust laws (§608b); for votes by producers (§608c(8)(A), (9)(B), (12), (16)(B), (19) and processors, (§608c(19); for the regulation of processors, associations of producers, and other handlers (§608c(1)); and for loans, quotas, etc. There are provisions for hearings (§§608(5), 608c(3)). But it is very clear that the whole structure of the Act contemplates a cooperative venture between the Secretary, the producers, and handlers. Nowhere in the Act can we find an express provision for participation by consumers in any proceeding. We are convinced that this is no accident. (Emphasis supplied) (Appendix B Page 19a).

It is respectfully submitted that 7 USC §602, which expressly defines consumers along with producers as persons to be protected on pricing (7 USC §602 (4)), cannot be dismissed as a Congressional pious platitude simply because the Congressional devices provided for implementation of the basic goal, in which consumers have an interest, are mechanically related to the supply industry.

This case therefore raises the question of the application of this Court's principles on standing to the Agricultural Adjustment Act of 1937, as amended.

Previously in *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 554, this Court granted standing to producers because of an economic loss which was in the nature of a sales tax. This Court stated at page 303 of the United States Reports:

> In substance petitioners' allegation is that in effect the Order directed without statutory authority a deduction of a sum to pay the United States a *sales tax on milk sold.* The statute and Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action. Such a right created by statute is mandatory in character and obviously capable of judicial

enforcement. For example the Order could not bar any qualified producers in the milk shed from selling to area handlers.

Consumers who are to be protected by Congressional mandate are likewise entitled to protection in their economic interests against illegal and ultra vires acts of the Secretary.

The economic effect upon consumers is direct and substantial. The petitioners uncontroverted affidavits indicating that as a matter of plain economics the taxing assessment may so add to the cost of "GO" as to price it off the market (which the Plaintiffs submit was the purpose and intent of the Secretary's regulations), thus depriving consumers of a needed product which in at least one case is related to medical treatment (Appendix D, Page 51a). At the very least, the extra assessment eliminates purchase by those consumers of lower income levels (Appendix D Page 51a).

There can be little doubt that consumers will incur a major financial burden as a result of the Secretary's assessment. 3/

3/ See *Association of Data Processing Service Organ.* v. *Camp*, 397 U.S. 151, 154, 90 S.Ct. 829, 830 where Mr. Justice Douglas stated that:

> That interest [legal interest], at times may reflect "aesthetic, conservational, and recreational" as well as economic values. We mention these economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here.

See also *Sierra Club* v. *Morton*, —U.S.—, 92 S.Ct. 1361, 1366 where Mr. Justice Stewart said in applying the "injury in fact" test to an injury of a non economic nature:

> But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Unlike the pleadings and affidavits in the *Sierra* case, the plaintiffs in the instant case state that they do use "GO" for both economic and medical reasons, and that their use of "GO" would be significantly affected by the proposed actions of the Secretary. The plaintiffs complaint declared that:

III

Important questions are raised which only this Court can settle.

The Agricultural Adjustment Act of 1937, as amended, (7 USC §608c) under which alleged authority the Secretary acted in promulgating the Final Decision and Order, expressly provides at 7 USC §608c (5) (G) as follows:

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or *in any manner limit, in the case of the products of milk,* the marketing in that area of any milk or product thereof produced in any production area of the United States (Emphasis supplied). 4/

It surely cannot be denied that a compensatory taxing assessment of 40% of the retail price in some manner limits the marketing of non fat milk powder produced in Minnesota and seeking outlet in Phoenix, Arizona.

In the Final Decision effecting the taxing assessment the Secretary defended his action on the grounds that 5(G) does not apply by the following words:

(footnote 3 continued)

> The aforesaid tax or penalty assessment will, if effectuated, cause and/or tend to cause the product "GO" to be removed from the market or in the alternative, the product will be unnaturally and unduly enhanced in price in an amount which will be a hardship upon your petitioners and particularly upon the poor and underprivileged in the class of consumers, and inflict an irreparable injury. (Appendix D Page 43a).

4/ The free trade legislative history of this Section was fully marshalled by this Court at length in *Lehigh Valley Cooperative Producers* v. *Freeman,* 370 U.S. 76, 82 S.Ct. 1168. The limitation on marketing here contested is based upon a surplus highest use differential found to be a trade barrier in that case at pages 98, 1180. Such a barrier is even less defensible when applied to manufactured products as opposed to the fluid products involved in *Lehigh Valley* (supra) because 608c 5(G) allows no limitation at all as to manufactured products.

> The exceptions overlook the fact that the payment applies only if the handler converts the nonfluid product to a fluid form and use. The payment is not required on nonfat dry milk, per se, and therefore does not have the effect of limiting its marketing as a product of milk within the meaning of 608c (5) (G) of the Act. 34 FR 16885.

It is respectfully submitted this is pure sophistry since the petitioners supporting affidavits show that a part of the market for nonfat milk powder has been eliminated. (Appendix D, Page 56a) and indeed this was the purpose of the entire proceeding in which the Secretary was swept into this regulation at the behest of monopoly interests.

All this occurs in face of a Congressional command not to "in any manner limit" the marketing of milk products, and under a statute which this court has held does not give the Secretary broad dispensing powers. (*Zuber* v. *Allen*, 396 U.S. 168, 90 S.Ct. 314 (1969)).

An obvious monopoly is fostered by a taxing assessment that goes not to the public treasury but to competitors. This illustrates the extreme seriousness of allowing Congressional intent to go unenforced by consumers who were intended to be protected.

In addition, the petitioners appeared at the reopened regulatory hearing, and objected to ex-parte conferences by the government held after rendition of the Recommended Decision and while the Final Decision was sub judice, and also to the scheduling of a hearing 1500 miles from the plaintiffs residence and where its witness members live.

Regulations of the Secretary allow consumers to appear as persons interested (7 CFR §900.8, Appendix C) and this right has recently been extended to consumers in all Department activities. (36 FR 13804, July 24, 1971). Similar provisions are in the Administrative Procedure Act, 5 USC §554.

Once a party, may the consumers ability to produce witnesses and construct their case be sacrificed for administrative convenience, and may issues be discussed ex-parte in face of the Secretary's Rules forbidding such discussions (See 7 CFR §900.16 and the letters of the Secretary to the plaintiff sternly advising consumers that he follows impecable procedures (Appendix E), which of course he subsequently did not.)

This issue troubled the District Court which cast it in a constituional aspect, but because of the pre *Barlow* v. *Collins* (supra) case law the court denied consumers standing to assert the question.

The Circuit Court opinion did not reach the question although it was raised by brief and in the record.

The issue is an important issue to the future scope and effectiveness of consumer exercise of the privilege to appear, and participate, in a matter affecting basic food commodities.

At the moment the rights of consumers are like lamps without oil. It is difficult to see how, without the intervention of this Court that situation can be changed.

The late Edmund Kahn stated:

> "Some consumers need bread; others need Shakespeare; others need their rightful place in the national society — what they all need is processors of law who will consider people's needs more significant than an administrative convenience. (Law in the Consumer Perspective, 112 U. Pa. L.Rev. 1, 13 (1963))."

Cited with approval by Mr. Justice Berger in *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F.2d 994 (cited with approval in *Data Processing* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John B. Carroll
Attorney for Petitioners

June 1972

Appendix A — Opinion and Order.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WILLIAM J. RASMUSSEN, dba
SARIVAL GUERNSEY FARMS,
Plaintiffs,

vs.

CLIFFORD HARDIN, Secretary of Agriculture
of the United States,
Defendant.

No. Civ-69-495 Phx. WEC

MARLENE L. KRESSE, etal.,
Plaintiffs,

vs.

CLIFFORD HARDIN, Secretary of Agriculture
of the United States,
Defendant.

No. Civ-69-496 Phx. WEC

OPINION AND ORDER

This matter arises out of motions for preliminary injunction filed by plaintiffs to enjoin certain amendments to the Central Arizona Milk Order from becoming effective on December 1, 1969. The Central Arizona Milk Order (7 CFR 1131) was issued in 1955 pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 by the Secretary of Agriculture and has been amended from time to time. Plaintiffs do not attack the provisions of the Central Arizona Marketing Order, but rather attack the 1969 amendments to the Order, relating to filled milk and producer-handlers (7 CFR 1131.11, 1131,18). The procedures followed in promulgating and issuing the regulations are set forth in the Final Decision relating to the Central Arizona Marketing Area at 34 F.R. 16548.

Plaintiffs allege that the Secretary of Agriculture exceeded his authority in promulgating the above-mentioned

amendments to the Order. Plaintiffs further allege they were denied due process by the reopening in Memphis, Tennessee, of a hearing originally commenced in Phoenix, Arizona, over the objection of plaintiffs.

Initially, two separate actions were brought containing essentially the same allegations. One action, Rasmussen d/b/a Sarival Guernsey Farms v. Hardin, No. Civ-69-495 Phx., was brought by a producer-handler affected by the Order, and the other action, Marlene L. Kresse, et al. v. Hardin, No. Civ-69-496, Phx., was brought by concerned consumers. The two actions have been consolidated.

A hearing was held November 26, 1969, at which the plaintiffs' and defendants' motions relating to both cases were heard. The Court at that time issued a preliminary injunction effective until December 15, 1969, which enjoined the effectiveness of the amendments in question as they would apply to plaintiffs. The Court also set a hearing for December 15, 1969, for arguments on defendants' motion to dismiss and on the question of whether the preliminary injunction should be continued, modified, or vacated.

On December 15, 1969, arguments were heard and both cases were taken under advisement. The preliminary injunction remained in effect pending this determination.

RASMUSSEN, etc. No. 69-495

As to plaintiff Rasmussen's cause, two basic issues remain: (1) Does this Court lack jurisdiction to hear plaintiffs' complaint because plaintiff has failed to exhaust the administrative remedies provided him under Section 608c (15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(15)(A); and (2) Was the holding of an evidentiary hearing at Memphis, Tennessee, remote from the area that would be affected by the Order, a violation of the Due Process Clause of the Fourteenth Amendment?

Exhaustion of Remedies

The Agricultural Marketing Agreement Act of 1937 as to handlers provides for administrative review before resort to the courts. 7 U.S.C. 608c(15)(A) and (B).

Plaintiffs contend that since defendant acted in excess of his authority and since irreparable injury is alleged, direct access to this Court is possible without resort to the administrative process. In support of this contention plaintiffs cite Abbott Laboratories v. Gardner, 387 U.S. 136, and Gardner v. Toilet Goods Ass'n., 387 U.S. 167. Neither Abbott Laboratories nor Toilet Goods has anything to say about the doctrine of "exhaustion of administrative remedies." Those cases were concerned with the doctrine of "ripeness." And this concern was in the context of a statutory procedure that did not require a prior administrative avenue of attack as does the pertinent statute herein. Cf. 21 U.S.C. §371 with 7 U.S.C. 608c(15). The language to which plaintiffs point makes exception to pre-enforcement review when there is a "statutory bar." Abbott Laboratories v. Gardner, supra, at 153.

"Ripeness" is by no means identical to the doctrine of "exhaustion." 3 Davis, Administrative Law Treatise, §21.01. p. 116.

> ". . . The ripeness focus is upon the nature of the judicial process -- upon the types of functions that courts should perform. The exhaustion focus is upon the relatively narrow question whether a party should be required to pursue an administrative remedy before going to court." Davis, supra.

"Ripeness" concerns the concreteness of a legal issue for the purpose of judicial review and not the question of which tribunal is required to have a first opportunity to pass on the question.

Plaintiffs cite Skinner and Eddy Corp. v. United States, 249 U.S. 557, for the proposition that when an administrative officer is alleged to have exceeded his jurisdiction access to the court is possible without resort to the administrative process. One respected authority has cautioned against reading Skinner and Eddy as an exception to the exhaustion requirement in such situations. Jaffe, Judicial Control of Administrative Action (1965), pp. 427-428. A close reading of the case indicates that what the Supreme Court was really saying was that there was no appropriate remedy to exhaust; i.e., that the administrative remedy was without relevance to the plaintiff's claims.

This court is of the opinion that it is without jurisdiction to entertain the merits of plaintiff's complaint prior to exhaustion of administrative remedies pursuant to 7 U.S.C. §608c(15)(A). This opinion is based primarily on United States v. Ruzicka, 329 U.S. 287; LaVerne Coop. Citrus Assn. v. United 143 F.2d 415; and Willow Farms Dairy, Inc. v. Benson, 276 F.2d 856. Although only Willow Farms is similar to the case at hand insofar as a handler is seeking judicial review prior to an enforcement proceeding or resorting to the administrative channels, that case relies directly upon Ruzicka, supra, which was an enforcement proceeding.

The Supreme Court in the Ruzicka case, supra, stated that the fact issues of constitutional dimension are raised does not negate the application of the exhaustion requirement:

> "It is suggested that Congress did not authorize a district court to enforce an order not 'in accordance with law'. The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find."

In LaVerne Coop. Citrus Ass'n. v. United States, supra, the Ninth Circuit held that:

> "A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order when the administrative remedy has not been invoked or has not been completed and there the one harmed by the administrative order is the moving party in the equity action. Lockerty v. Phillips, 310 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339; Myers v. Bethlehem Shipbuilding Corp, 303 U.S. 41, 58 S.Ct. 459, 82 O.Ed. 638; United States v. Superior Court, 19 Cal. 2d 189, 120 P.2d 26."

Futility and Inadequacy

Plaintiffs contend, in addition, that they are not required to exhaust administrative remedies in this case because to do so would be futile, and furthermore, that the available relief at the administrative level is inadequate to prevent irreparable harm. Plaintiff cites In Re Lyles Dairy Products, Dept. of Agriculture, Dec, 14, 1964, in support of its argument. The question is whether the Lyles decision as to "handlers" and reconstituted milk precludes the Secretary of Agriculture from ruling in favor of plaintiff-"producer-handler" and its filled milk product in this case. This Court does not believe that decision so precludes. In the case at hand, we are confronted with a different classification (producer-handlers), a different set of amendments to a different milk order, and with a different milk product. This Court cannot say with reasonable assurance that prior resort to the administrative process would be an exercise in futility.

Plaintiff's understanding of the possible relief obtainable at the administrative level is not tenable. §900.70 of 7 CFR provides as follows:

"§900.70 Application for Interim Relief

(a) Filing the application. A person who has filed a petition pursuant to §900.52[1] may by separate application filed with the hearing clerk apply to the Secretary for an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding."
(Emphasis and footnote added)

Thus it is clear that plaintiffs, in a proper showing can secure a stay of effectiveness of the order at the administrative level. The available relief, if obtained, is not inadequate.

If this Court had proper jurisdiction to entertain the merits under §608c(15)(B), that subsection expressly provides that the pendency of proceedings instituted pursuant to §608c(15) "Shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to §608a(6)," the enforcement provision. In other words, even if this Court had proper jurisdiction it would not have authority to stay enforcement, let alone effectiveness. And such lack of authority exists even if irreparable injury is shown.[2] United States v. Mills, 187 F. Supp. 314 at 320.

1/ Section 900.52 provides for the filing of a petition with the Secretary of Agriculture by any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law.

2/ The Court recognizes that this Court by Judge Copple recently stayed *enforcement* proceedings in *United States* v. *Shamrock Foods Co., Inc.*, Civ-69-161 Phx. Although the Court in that case recognized there might be some irreparable harm to producers, handlers and the public if enforcement was stayed, the Court granted relief "in view of

Denial of Due Process

Initially a hearing was held in Phoenix, Arizona, from February 7 to February 10, 1967. Plaintiffs appeared, presented their cases, and filed briefs. A recommended decision based on the evidence produced at the hearing was issued. Exceptions were filed by plaintiffs and the recommended decision was issued again.

Subsequently, it came to the Department of Agriculture's attention that the problems pertaining to filled milk and producer-handlers were national in dimension. Thus, allegedly in the interest of uniformity of treatment, a national hearing was called to be held at Memphis, Tennessee on February 19, 1968. The Central Arizona Marketing Area was included in that notice of hearing. The Phoenix hearing was reopened so that any supplemental evidence could be brought forward. Plaintiffs' attorney appeared and moved to adjourn and transfer the hearing to Phoenix. Those motions were denied. After the Memphis hearing the parties again had an opportunity to file briefs and exceptions to the recommended decision. Those opportunities were exercised.

What concerns this Court is whether the reopening of the hearings as to Milk Order 131 (Central Arizona Marketing Area) at a place remote from the affected marketing area, namely Memphis, Tennessee, denied the plaintiffs due process of law because they were effectively denied the opportunity to present evidence at that hearing

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2/ [footnote continued]

the fact that the defendant already [*had*] obtained a favorable administrative recommendation and in further view of the fact that the ultimate resolution of the controversy via the Secretary of Agriculture channel seems imminent, . . ." That decision does not support a request for a stay of effectiveness.

in light of the financial and temporal obstacles of attending lengthy hearings at a distant location. The Court is not questioning the Secretary's power to hold national hearings. The Court is questioning whether certain matters, such as the presentation of evidence, can be done at such a national hearing or whether it must be done at a more local place. The Court is further concerned because plaintiffs' attorney at oral argument alleged that the primary purpose of the Department's calling of the Memphis hearing was to give producers' representatives from all across the nation an opportunity to ponder the rather unique problem created by producer-handler Sarival Dairy of Arizona.

It appears that we may have a case of first impression on the due process issue. However, in view of our decision on the exhaustion issue, supra, and in further view of the Supreme Court's language in United States v. Ruzicka, supra, at page 294 to the effect that even questions of a constitutional dimension must first be presented to the administrative process, this Court lacks jurisdiction to consider this issue at this time.

KRESSE, et al., No. 69-496

Marlene L. Kresse, et al., have brought this action as an unincorporated consumer protection association, as individuals, and on behalf of a class of purchasers and consumers of "Go", a filled milk product manufactured by Sarival Guernsey Farms. They allege that as a result of the amendments to the Central Arizona Milk Marketing Order, the price at which consumers purchasing "go" will thereby suffer economic harm in the form of loss of income which infringes Fifth Amendment rights. In their complaint, the plaintiff consumers further allege invalidity of the marketing order on the same grounds as alleged by Rasmussen.

Standing to Sue

Consumers, unlike handlers, are not specifically required by statute to exhaust a prior administrative procedure before resorting to the district courts. The Act regulates handlers, not consumers. Thus, the issue involved with these plaintiffs is whether they have standing under the Act to attack the amendments to the marketing order.

This Court is of the opinion that plaintiff consumers lack standing to sue in this matter. By the express language of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601, et seq., and the milk order issued thereunder, regulations are imposed solely on "handlers" of milk. It has been frequently recognized by the courts that unregulated non-handlers are not given greater status in relation to the availability of judicial review than regulated handlers. Uelman v. Freeman, 267 F.Supp. 842; Benson v. Schofield, 236 F.2d 719; and United Milk Producers of New Jersey v. Benson, 225 F. 2d 527. The Court of Appeals in Schofield, supra, at page 722, articulated the rule on standing in milk order cases:

> ". . . appellees, 'to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.' Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes damnum absque injuria which does not confer standing."

When non-regulated producers have been given standing the Courts have done so in cases involving deductions or diversions from the producer's settlement fund in which the producers were held to have a legal proprietary interest. Stark v. Wickard, 321 U.S. 288; Blair v. Freeman, 370 F.2d 229.

Plaintiff consumers' contention that they have a right to maintain this action because they may suffer a loss of income in purchasing "go" at a higher price is, of course, foreclosed by the language of Schofield. Plaintiff consumers further contend that under the Agricultural Marketing Agreement Act consumers are a class which Congress intended to protect and, therefore, they have a particular right or interest created under the Act which can be protected by the Court.3/ In support of this contention plaintiff consumers cite §602 of the Act (7 U.S.C. §602) and the committee report on the bill which ultimately became the Act in question.

§602 states, inter alia, that it is the policy of Congress "to protect the interest of the consumer" by achieving a price level consistent with the parity level declared by Congress, and "to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in §608c(2) of this title as will provide, in the interest of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing

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3/ Plaintiff consumers argue that the Administrative Procedure Act's review provision, 5 U.S.C. §702, has been incorporated into the Agricultural Marketing Agreement Act at 7 U.S.C. 608a(8) and thereby provides an independent basis for conferring standing. The courts have construed this section of the APA to merely reaffirm existing law and not to create a new basis for a claim of standing. *Kansas City Power and Light Co.* v. *McKay*, 225 F.2d 924 (D.C.Cir. 1955) cert. den. 350 U.S. 844 (1955); *REA* v. *Central L. A. Elect. Co.*, 354 F.2d 859 (5th Cir. 1966) cert. den. 358 U.S. 815; and *Barlow* v. *Collins*, 398 F.2d 398 (5th Cir. 1968) (presently before the Supreme Court — Docket No. 249). Thus, whether a person suffers "legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute," (5 U.S.C. §702), merely asks the question whether the statute in question expressly or impliedly grants standing independent of the language of the Administrative Procedure Act.

season to avoid unreasonable fluctuations in supplies and prices." (Emphasis added) The committee bill itself adds nothing to plaintiffs' argument based on the language of the Act.

As indicated by emphasis, supra, §602's declaration of policy would support an argument for across the board standing to "producers" as well as consumers. Yet, the courts, except within the narrow exception mentioned, have denied standing to producers, notwithstanding the fact that their interest in milk order proceedings is clearly stronger than that of consumers. It would be difficult to justify granting such standing to consumers who are really alleging a mere potential loss of income should they choose to purchase "Go" at a higher price in the future. Furthermore, since handlers are also consumers, granting standing to consumers would provide handlers with a means of avoiding prior administrative exhaustion. This would clearly frustrate legislative intention.

In summary, the consumer plaintiffs have not shown that a particular legal right created either expressly or impliedly by the Agricultural Marketing Agreement Act was infringed by the Secretary's action. Their potential loss of income is damnum absque injuria which does not confer standing.

WHEREFORE, IT IS ORDERED:

Cause No. Civ-69-495 Phx. is dismissed for want of jurisdiction.

Cause No. Civ-69-496 Phx. is dismissed for want of standing.

DATED this 19th day of January, 1970.

s/ WALTER R. CRAIG
United States District Judge

DATED this 19th day of January, 1970.

s/ WALTER R. CRAIG
United States District Judge

Copies sent to:

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM J. RASMUSSEN, etc., *Plaintiff-Appellant,* vs. CLIFFORD HARDIN, Secretary of Agriculture of the United States, *Defendant-Appellee.*	No. 25,668
MARLENE L. KREESE, et al., *Plaintiff-Appellants,* vs. CLIFFORD HARDIN, Secretary of Agriculture of the United States, *Defendant-Appellee.*	No. 25,669

[March 29, 1972]

Appeal from the United States District Court
for the District of Arizona

Before: MADDEN, Judge, United States Court of Claims*,
BROWNING and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

These are appeals by the plaintiffs from orders dismissing two actions challenging the validity of certain provisions of a milk marketing order promulgated by the defendant Secretary of Agriculture. We affirm in both cases.

*The Honorable J. Warren Madden, Judge, United States Court of Claims. Judge Madden participated in the hearing of these cases, but died before this opinion was prepared.

Appendix B — Decision.

1. *Nature of the cases.*

The complaints are identical in the two cases except for the parties plaintiff. In No. 25,668 the plaintiff Rasmussen is a milk producer and handler who also makes and sells a milk product called "Go." In No. 25,669, the plaintiffs Kresse, et al., are consumers of "Go," and all but two of them are members of Concerned Consumers, an unincorporated association.

The complaints assert a common law right to be free from unlawful regulation by the Secretary. They also allege that the Secretary violated the appellants' Fifth Amendment right to due process by holding hearings concerning the milk order in a location some 1,500 miles from appellants' residence. Finally, they allege that by attempting to regulate the milk product marketed by Rasmussen, the Secretary exceeded his statutory authority and imposed an unlawful burden on consumers.

The cases arise from orders issued by the Secretary under the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 ff., and particularly § 608c. Rasmussen is an operator of a dairy in the central Arizona marketing area. As a producer-handler, handling milk produced by him, he has been exempt from the pooling and pricing provisions of the Secretary's marketing order for the area, 7 C.F.R. § 1131.11. In 1965, he began to make and market "Go" from powdered skim milk and other ingredients, which he brought to Arizona from outside the state. All that he adds that is not so imported is local water. He sold "Go" in competition with fresh milk, and at a lower price. By 1969 about 17.1% of his milk distribution was "Go.".

Since 1964, marketing orders have required that a regulated handler who buys milk powder and converts it into fluid skim milk must account for it at the higher Class I price (29 F.R. 9002). In 1964, the Secretary held national hearings on the question of requiring handlers who reconstitute dry milk powder into skim milk drinks, including drinks which had various substances added to flavor or fortify them, to account for the milk powder at Class I rather than surplus prices. 29 F.R. 9002, 9010. The Secretary concluded they should, and the marketing orders, including the Central Arizona Order, were amended to reflect this. 29 F.R. 9284. However, Rasmussen as a producer-handler was not affected.

Appendix B — Decision.

On December 14, 1966, and thereafter, the Secretary gave notice of public hearings to consider proposed amendments to the Central Arizona Marketing Order, including proposals to classify filled milk under the order and to review the producer-handler definition. See 31 F.R. 16227; 32 F.R. 140; 32 F.R. 415. The public hearing was held in Phoenix, Arizona, on February 7-10, 1967, and interested parties, including Rasmussen, appeared, presented evidence, and filed briefs. On October 9, 1967, a Recommended Decision was issued. 32 F.R. 14232. The decision concluded that (1) filled milks should be priced as Class I products, and (2) producer-handlers should not be exempted if they use milk powder not of their own production to manufacture filled milk. 32 F.R. 14233. Exceptions to this Recommended Decision were filed by Rasmussen and others.

Subsequently, the Secretary, following a series of public meetings determined to hold national hearings on the question of "how filled milk should be classified and priced" under all Federal milk orders. 34 F.R. 16881. This national hearing, held at Memphis, Tennessee in 1968, reopened prior hearings on thirteen orders including that for Central Arizona. Rasmussen appeared at these hearings, but rather than present any evidence additional to what he had already presented at Phoenix, objected to the location of the national hearings and moved to adjourn or dismiss them. The requests were denied, and Rasmussen took no further action except to file exceptions to the Recommended Decision that followed the hearings. The Secretary then issued a Final Decision applicable to all marketing orders (34 F.R. 16881), and a Final Decision incorporating its findings and conclusions and the same terms for Central Arizona. 34 F.R. 16548.

In the Final Decision the Secretary concluded that the skim milk component of filled milk, whether obtained from fluid skim milk or reconstituted dry milk powder, should be priced and pooled as a Class I product. 34 F.R. 16882-83. The Final Decision also provided that if a producer-handler reconstitutes nonfat powder into a fluid milk product, he loses the privilege of exemption provided to producer-handlers like Rasmussen.

Title 7 U.S.C. § 608c(15) provides for administrative and judicial review. Subsection (A) provides that "[a]ny handler subject to an order may file a written petition with the Secretary

of Agriculture, stating that any such order . . . is not in accordance with law and praying for a modification thereof or to be exempted therefrom." It requires that the handler be given an opportunity for a hearing. After the hearing, the Secretary "shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law." Subsection (B) provides that "[t]he District Courts of the United States in any district in which such handler is an inhabitant . . are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of entry of such ruling." Rasmussen chose not to file a petition pursuant to section 608c(15)(A), but instead filed the present action in the district court.

2. *Failure to exhaust administrative remedy—Rasmussen's appeal No. 25,668.*

The trial judge dismissed Rasmussen's case for failure to exhaust his administrative remedy. This was correct. The principles of *United States v. Ruzicka*, 1946, 329 U.S. 287, are controlling. *Ruzicka* arose in the context of an enforcement action under Section 608a, but its principles apply with equal force to Rasmussen's present suit. In *Ruzicka*, the Supreme Court was concerned with the distribution of authority between the courts and the Secretary. The Court first noted that the "procedure devised by Congress explicitly [gives] to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with "the intricate business of milk control." Id. at 292. The Court also indicated that this administrative remedy should be employed even though the matter to be reviewed was essentially a legal or constitutional question:

> ". . . whether . . . an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether . . . an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. ***Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy***

> *in the first instance must be sought from the Secretary of Agriculture." Id.* at 294 *(Emphasis added.)*

We have followed *Ruzicka. Panno v. United States,* 9 Cir., 1953, 203 F.2d 504; *see also La Verne Co-op. Citrus Ass'n v. United States,* 9 Cir., 1944, 143 F.2d 415.

Stark v. Wickard, 1944, 321 U.S. 288, on which Rasmussen relies, is not in point. There, the party regulated by the order was a producer, for whom Congress had failed to provide an administrative remedy. In upholding judicial review, the Court relied on the fact that the statute created "definite personal rights' in producers. (321 U.S. at 309.) *Gardner v. Toilet Goods Ass'n, Inc.,* 1967, 387 U.S. 167, is also not in point. The statute there involved did not provide for an administrative remedy to attack the regulation involved. In *Abbot Laboratories v. Gardner,* 1967, 387 U.S. 136, 141-6, decided the same day as *Gardner,* the Court based much of its analysis on language in 21 U.S.C. § 371 (f)(6), which provides:

> "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law."

Rasmussen argues that 7 U.S.C. § 608a(8) contains similar language, and thereby provides the statutory basis for the present action. Section 608a(8) states:

> "The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity."

However, as the Court held in *Ruzicka, supra,* 329 U.S. 291, n.2, this language, in context, refers only to the government's remedies, not to Rasmussen's.

Finally, Rasmussen argues that the Supreme Court's interpretation of 7 U.S.C. 608(c)(5)(G) prohibits the milk order promulgated by the Secretary here. See *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 1962, 370 U.S. 76. The case does not help Rasmussen. The plaintiff there had exhausted his remedy under § 608c(15); Rasmussen has not.

3. *Standing—the Kresse appeal, No. 25,669.*

The appellants in No. 25,669 admittedly have no administrative remedy under Section 608c(15)(A). They argue that the district court erred in dismissing their action for lack of standing to sue. Their primary reliance is on two Supreme Court cases which came down after the district court decided this case: *Association of Data Processing Service Organizations, Inc. v. Camp*, 1970, 397 U.S. 150; *Barlow v. Collins*, 1970, 397 U.S. 159. In finding standing to sue in those cases, the Court devised a three-part test: The plaintiffs had standing to sue because (1) the challenged action caused them injury in fact; (2) the interest they sought to protect was within the zone of interests to be protected or regulated by the statute in question; and (3) the statute did not prohibit judicial review. Appellants argue that the application of these criteria to the present case requires reversal.

We think not. We do not decide whether appellants fall within the first and second criteria, because they do not meet the third. In *Barlow* the Supreme Court established that judicial review is the rule and non-reviewability the exception. 397 U.S. at 166. But in *Data Processing* the Court also indicated that Congress could decide the question one way or the other. 397 U.S. at 154. In neither *Data Processing* nor *Barlow* did the statutes involved contain any reference to the question of judicial review. See 12 U.S.C. §§ 21 *et seq.*; 12 U.S.C. §§ 1261 *et seq.*; 7 U.S.C. 1444(d) (1964 ed., Supp. IV); 16 U.S.C. § 590h(g). Here, however, Section 608c(15)(B) limits judicial review to handlers. We hold that Congress has resolved the question of standing.

It is true that § 608c(15) does not expressly say that persons other than handlers, and particularly consumers, shall not be entitled to judicial review. That, however, is not necessary. As the Court said in Barlow, "[t]he question then becomes whether nonreviewability can fairly be inferred. . . . A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose." (397 U.S. at 166-67) Here we find "clear and convincing evidence" (*id.*) of such a command.

The statute before us does more than provide for administrative and judicial review and name the affected class entitled to seek it. Section 608a(6) provides for enforcement of the Secretary's

orders. And Section 608c(15)(B) provides that pendency of administrative or judicial review under that section "shall not impede, hinder, or delay the United States or the Secretary . . . from obtaining relief pursuant to section 608a(6). . . ." It was this language that led the Court to hold, in *Ruzicka*, that grounds for attacking an order under § 608c(15) could not be raised in a § 608a(6) proceeding. The rationale that we have quoted from *Ruzicka* points strongly to the conclusion that Congress did not intend that persons like appellants, who are affected by the order only if they choose to buy "Go," and then only in that they must pay a higher price for it, should have standing to seek review.

Nor can it be said that Congress overlooked consumers, and that therefore it did not intend to exclude them from obtaining administrative and judicial review of the Secretary's orders. The Act contains some pious platitudes about the interests of consumers. See §§ 602(2)(3)(4), 608a(1). The primary purpose of the Act, however, is to protect the purchasing power of the farmers and the value of agricultural assets. (§601.) The whole scheme of the Act is to raise the prices of agricultural products to, and keep them at, levels fixed by the Secretary, and to establish "orderly" marketing of them. Bluntly stated, that means, in part, marketing freed to a very large extent from price competition. It is arguable that the immediate, and possibly the long-run, interests of consumers are contrary to these goals. It is not surprising that the Act is full of provisions for agreements between the Secretary and producers (§608(2), 608a(3)) or growers (§608a(3)), processors (§608b) and handlers (§608b), agreements which are exempt from the antitrust laws (§608b); for votes by producers (§608c(8)(A), (9)(B), (12), (16)(B), (19)), and processors, (§608c(19)); for the regulation of processors, associations of producers, and other handlers (§608c(1)); and for loans, quotas, etc. There are provisions for hearings (§§ 608(5), 608c(3)). But it is very clear that the whole structure of the Act contemplates a cooperative venture between the Secretary, the producers, and handlers. Nowhere in the Act can we find an express provision for participation by consumers in any proceeding. We are convinced that this is no accident.

To grant consumers standing would be to say that, while Congress regarded it as imperative that a challenge by a ***handler*** who is directly regulated by a marketing order, first be con-

sidered by the Secretary, it was nevertheless the legislative judgment that if advanced by consumers, the same challenge did not require initial scrutiny by the administrative body. There is no basis for attributing to Congress the intent to draw such a distinction. Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c(15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope.

Furthermore, giving appellants standing to sue would provide a handler with a convenient device for evading the statutory requirement that he first exhaust his administrative remedies. A handler need only find a consumer who is willing to join in or lend his name to an action in the district court, raising precisely the same exceptions that the handler must raise administratively. The identity of the complaints and of counsel for all appellants in these cases points up the possibility. We are not unsympathetic to the plight of the consumer appellants, but we think that if they are to have a remedy, Congress must supply it.

None of the additional cases cited by appellants requires that they be granted standing to sue. In *Stark, supra*, the Supreme Court did hold that a producer had standing to sue when he was claiming that moneys belonging to him were being improperly diverted to others. But the courts have followed *Stark* only in identical situations. *See Zuber v. Allen*, 1969, 396 U.S. 168; *Blair v. Freeman*, 1966, D.C.Cir., 370 F.2d 229. And no court has suggested that consumers should be granted standing on the basis of *Stark* in such cases as this.

Nor do *Harry H. Price & Sons, Inc. v. Hardin*, 5 Cir., 1970, 425 F.2d 1137, *cert. denied*, 400 U.S. 1009, or *Walter Holm & Co. v. Hardin*, D.C.Cir., 1971, 449 F.2d 1009, require a contrary result. There the courts held that the plaintiffs, who were a tomato repacker and tomato importer respectively, had standing to challenge an administrative order promulgated by the Secretary under Section 608c. In *Price & Sons, Inc.*, it is not suggested that the Fifth Circuit would extend its holding to consumers. Furthermore, the court, which relied on *Data Processing* to reach its result, omitted any discussion of the question of whether the

statute prevented judicial review; apparently the question was not raised.

In *Walter Holm & Co.*, the order challenged had a much more direct impact on the plaintiff than the order challenged here has on appellants. The plaintiff in *Walter Holm & Co.*, was an importer of Mexican tomatoes, and attacked the Secretary's regulation limiting the size of such tomatoes. In holding that the plaintiff had standing to sue the court explicitly noted that although the appellant was not among the domestic handlers directly governed by the Secretary's order, he was nevertheless directly affected since the law, as administered by the Secretary, resulted in automatic import restrictions of the same nature being applied to the operations of importers. 449 F.2d at 1011. No such immediate link exists in the present case between the Secretary's order and the consumer appellants. Moreover, as in *Price & Sons, Inc.*, there is no discussion of whether the statute prevented judicial review; apparently the question was not raised.

Affirmed.

Appendix C — Statutes and Regulations.

5 USC 554

§554. ADJUDICATIONS.

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to Section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub. L. 89-554, Sept. 6, 1966. 80 Stat. 384.

§602. DECLARATION OF POLICY; ESTABLISHMENT OF PRICE BASING PERIOD; MARKETING STANDARDS; ORDERLY SUPPLY FLOW; CIRCUMSTANCES FOR CONTINUED REGULATION

It is declared to be the policy of Congress —

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish

and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of said sections. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, § 1, 61 Stat. 707; July 3, 1948, c. 827, Title III, § 302(a), 62 Stat. 1257; Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906; Aug. 8, 1961, Pub. L. 87-128, Title I, § 141(1), 75 Stat. 303.

§702. RIGHT OF REVIEW

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

* * * * *

§ 608c. ORDERS REGULATING HANDLING OF COMMODITY - ISSUANCE BY SECRETARY

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable; single commodities and separate agricultural commodities

(2) Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, and Connecticut, and not including fruits for canning or freezing other than olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), hops, honeybees and naval stores as included in the Naval Stores Act and standards

established thereunder (including refined or partially refined oleoresin); Provided, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest

production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use

classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably

to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or

marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order.

Regional application

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional productions areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary.

Petition by handler for modification of order or exemption; court review of ruling of Secretary

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title.

Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Milk prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area or, in the case of orders applying only to manufacturing milk, the production area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area or, in the case of orders applying only to manufacturing milk, the production area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments

in such prices. As amended Nov. 3, 1965, Pub. L. 89-321, Title I, §§ 101, 102, 79 Stat. 1187; Nov. 8, 1965, Pub. L. 89-330, § 1(b), 79 Stat. 1270.

§900.8 CONDUCT OF THE HEARING.

(b) Appearances — (1) Right to appear. At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding. Any interested person who desires to be heard in person at any hearing under these rules shall, before proceeding to testify, state his name, address and occupation. If any such person is appearing through a counsel or representative, such person or such counsel or representative shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names and addresses and occupations of such person and such counsel or representative. Any such person or such counsel or representative shall give such other information respecting his appearance as the presiding officer may request.

§900.16 DISCUSSION OF ISSUES, ETC., OF PROCEEDING PROHIBITED.

Except as may be provided otherwise in this subpart, no officer or employee of the Department shall, following the close of the hearing in a marketing agreement or marketing order proceeding and prior to the execution of a marketing agreement or the issuance of a marketing order therein, discuss the issues, merits, or evidence involved in the proceeding with any person interested in the result of the proceeding or with any representative of such person: Provided, however, That the provisions of this section shall not preclude an officer or employee who has been duly assigned to, or who has supervision over, a proceeding from discussing with interested persons or their representatives

matters of procedure in connection with such proceeding. Insofar as the provisions of this section are inconsistent with the provisions of Regulation 1544 of the publication entitled "Regulations of the U. S. Department of Agriculture," the provisions of this section shall prevail.

7 USC §608a. COMULATIVE REMEDIES

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity.

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association; and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK and PATRICIA RHYNE, consumers of "GO", Plaintiffs, vs. CLIFFORD HARDIN, Secretary of Agriculture of The United States, Defendant.	CIVIL ACTION # 72-88-PHX COMPLAINT

NOW come the Plaintiffs, and each of them, for a complaint to the Court against the Defendant and do now allege as follows:

JURISDICTION AND VENUE

I

The Plaintiffs, other than Barbara Buck and Patricia Rhyne, and each of them, are residents of the District of Arizona, and are organized as Concerned Consumers, an unincorporated association of which the Plaintiff Marlene L. Kresse is President and the Plaintiff Steve Juharos is Treasurer, which association for many years has been active in consumer protection activities in the State of

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Arizona on behalf of Arizona consumers. Plaintiffs Barbara Buck and Patricia Rhyne are each residents of the District of Arizona and are each consumers of "GO".

II

That the Defendant, Clifford Hardin, is Secretary of Agriculture of the United States of America with official residence in Washington, D.C. and at all times hereinafter alleged was acting in his official capacity.

-1-

III

The Plaintiffs, individually, jointly, and pursuant to Rule 23 of the Rules of Federal Procedure as described hereinafter bring this action on behalf of a class known as purchasers and consumers of "GO", a food drink more particularly defined hereinafter. This class is upwards of several thousand people whose joinder is impractical and unnecessary to preserve their rights. The questions of fact and law raised herein are identical to those affecting or bearing upon the class, and the claims herein are typical of those which are raised by or could be raised by such a class. The said class will be fairly insured of adequate representation of all and by reason of the interest of the Plaintiffs herein, the maintenance of the class action will, as a practical matter, dispose of the issues herein raised on any future proceeding. The interests of the Plaintiffs are identical to and co-extensive with the class.

IV

This suit concerns the Common Law rights and the United States Constitutional and Federal statutory rights of the Plaintiffs and their class, and specifically and without limitation, the

Fifth Amendment to the Constitution of the United States; the jurisdiction of the Defendant under Title 7 USC, Sec. 608c et seq. and duties provided for at Title 5 USC concerning administrative hearings and decisions, as more particularly set forth hereinafter.

V

The jurisdiction and venue of this suit is based upon the inherent and statutory power of District and Appellate Courts to sit in equity to protect the aforesaid rights and further pursuant to Title 28 USC Sec. 5, 1331, 1337, 1391, 1651, 2201, and 2282 and such other provisions as may be made by law including, but not limited to, those set forth in the Administrative Procedure Act, Chapter 7, Title 5 USC.

VI

That there is now existing between the parties an actual and justiciable controversy as to the law to be applied to the Plaintiffs' claims, in respect of which the Plaintiffs need and require a declaration of their rights by this Court and further order for appropriate protection and enforcement of their rights by stay, mandatory and restraining orders against the Secretary and/or the enforcement of the statute.

STANDING AND RIPENESS

VII

The Plaintiffs are consumers and purchasers for cash at retail of a food drink known as "CO", which is manufactured by William J. Rasmussen, doing business as Sarival Guernsey Farms, of Glendale, Arizona, and sold in ½ gallon containers to independent stores located in the State of Arizona only, principally in Phoenix, Arizona. These stores in turn resell "CO" to your Plaintiffs. The dollar value of the purchases by your Plaintiffs and the class they

represent has been in excess of $296,000.00 per annum, but substantially less thus far in the year 1969. The manufacture, sale and purchase of "GO" has been without the imposition of a penalty or assessment by the Defendant at any stage of marketing for approximately four years.

VIII

"GO" is now manufactured as follows: Manufactured, non-fat dried milk powder is purchased from states other than Arizona, local Arizona water is mixed with that powder, a fat, originating wholly from vegetables, is added, together with mono and diglycerides and beta carotene and vitamins A and D. A product "Chocolate Flavored Beverage" is also made as a chocolate drink consisting of the "GO" ingredients to which chocolate, sugar and stabilizer is added and vitamins omitted. No milk produced in or for Arizona and no vegetable fat or other ingredients produced in Arizona are used in the said products.

IX

Sarival, the manufacturer of "GO", also produces, processes and markets at retail/wholesale fresh milk produced by his own cows in and about Phoenix, Arizona, and he is presently an exempt producer-handler under the Central Arizona Federal Milk Marketing Order, (7CFR 1131).

X

Pursuant to Title 7 USC 608c 5, 7, the Defendant has issued a Final Decision (34 FR 16548, No. 199 - Thursday, October 16, 1969), attached hereto as Exhibit A, and Decision on Proposed Amendments to Tentative Marketing Agreements and Orders (Milk in Memphis, Tenn, and Certain Other Marketing Areas, 34 FR 16881, No. 201 - Saturday, October 18, 1969), attached hereto as Exhibit A1.

and by said Exhibit A and Exhibit A1 the said Defendant has exercised jurisdiction over and claimed the power to regulate and levy a compensatory tax or penalty assessment upon the manufacture and sale of "GO" by Sarival. The rate of payment is calculated at the volume of such sales times the dollar difference between the fluid and surplus prices of such order which in 1968 on an annual average would have amounted to $.10 per 1/2 gallon of "GO". The Defendant did further exempt from assessment the fresh milk sales of Sarival, on condition that he not manufacture or sell "GO" as he is presently doing, on pain of violation of which sums of money would be due. In 1968 these monies would have amounted to $.05 per 1/2 gallon of "GO" sales. In total in 1968, the Final Decision levies order costs of $.15 per one-half gallon of "GO", and does not recognize other market costs of approximately $.02 per 1/2 gallon of "GO". (Exhibits C and E

XI

The Defendant will distribute the aforesaid monies directly to co-operatives, milk dealers and milk producing farmers serving the Central Arizona area, who neither manufactured, handled nor produced "GO" nor any of its ingredients.

XII

No benefit is derived from payments on account of "GO" and only detriment results therefrom as appears from Exhibits D and C attached.

XIII

The Defendant, aside from the Final Order terms complained of, has more favorably regulated other filled milk products made from fresh Arizona skim milk. As more particularly appears by Exhibits C and D, the discrimination against "GO" as compared to

fresh Arizona skim milk products is approximately $.13 per half gallon of "GO" in 1969.

XIV

Two Secretaries of Agriculture have proposed to exert such jurisdiction over "GO" on three occasions over a period of years. The construction of the Secretary and the Department as to the extent of their legal and jurisdictional power over "GO" has therefore been firmly established.

XV

The Defendant has denied your Plaintiffs the right to be heard at a re-opened hearing at the place of their residence, Phoenix, Arizona, and did schedule a re-opened hearings on the subject of "GO" at Memphis, Tennessee and refused prior to and after convening the said hearing to adjourn to Arizona, and thereafter closed the hearing, and again denied such adjournment to Arizona after further request by brief and exception, and promulgated the aforesaid Final Decision denying such request. No reason has been assigned for such refusal at any time.

XVI

In addition, the Defendant has claimed to possess and has actually exercised the right to convene a national hearing, and promulgate the Final Order and Decision at 34 FR 16548 on evidence of marketing conditions in areas other than Arizona in spite of Title 7 USC 608c (11), which favors regional milk marketing regulations.

XVII

That there is no statutory provision for administrative review by the Plaintiffs of the matters alleged herein. The class of which the Plaintiffs are members is among those to whom notice

is given, and the Plaintiffs are within the class sought to be benefited and protected by Congress pursuant to Title 7 USC 602 (2), and Title 7 USC 608c (18), and the Plaintiffs, except the Plaintiffs Barbara Buck and Patricia Rhyne, without objection appeared specially at the hearing through counsel and preserving their special appearance filed exceptions, and were so recognized by the Defendant and other participants.

XVIII

The attached affidavits, (Exhibits B, C, D, and E), make it plain that the aforesaid tax or penalty assessment will, if effectuated, cause and/or tend to cause the product "GO", which is the only product manufactured from non-fat milk powder, to be removed from the market, or, in the alternative, the product, for the period of time marketed, will be unnaturally and unduly enhanced in price in an amount which will be a hardship upon your petitioners and particularly upon the poor and underprivileged in the class of consumers, and inflict an irreparable injury for which no practical redress is available, should the Plaintiffs prevail at a later point in time.

XIX

There is no need or necessity for the immediate imposition of such tax and penalty assessment pendente lite, as is well illustrated by the lapse of approximately three years since the proposal was first made, all without actual imposition of the tax or penalty.

XX

The class prices under such order are not fixed by proper standards reflecting cost to Arizona farmers and it is not responsive to the needs of consumers and is in excess of the authority of

the Secretary.

XXI

MATTERS IN CONTROVERSY

The Plaintiffs maintain they possess the rights alleged hereafter to be in controversy.

A. CONSTITUTIONAL MATTERS

1. Are the Plaintiffs entitled to due process in the formulation of a Final Decision pursuant to Title 7 USC 608c, and if so, were such rights violated by the procedure followed in formulating the decision at 34 FR 16548?

2. Are the Plaintiffs entitled to equal regulation of products such as "GO" made from out of state non-fat milk powder, with that regulation given fresh Arizona skim milk produced for Central Arizona, and if so, were such rights violated by the substantially higher rate of compensatory assessment on "GO" fixed by the Secretary in the Final Decision at 34 FR 16548?

3. Are the Plaintiffs entitled to protest the application of monies supplied by them, and if so, may those who did not directly or indirectly produce or process "GO" or its ingredients personally pocket the proceeds from the compensatory penalty tax or assessment upon "GO", and may the Plaintiffs be required to pay monies on account of such plan without any benefit therefor?

4. If the Court finds the Congress has authorized a violation of the rights set forth at 1-3, may the Act stand as against the Fifth Amendment to the Constitution and other relevant Constitutional provisions, either on the face of its provisions or as applied to Sarival and the Plaintiffs?

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XXII

B. STATUTORY MATTERS

1. In view of the legislative history of the Act as interpreted in Lehigh Valley Cooperative Producers vs. Freeman, 370 U.S. 76, are the Plaintiffs correct in maintaining that the compensatory penalty tax and assessment on "GO" set forth in the Final Decision and Order at 34 FR 16548 is not, as is maintained by the Secretary, saved from the prohibition of Title 7 USC 608c 5 (G) which provides that the Secretary can not "in any manner limit" the marketing of milk products in a regulated marketing area, by the fact that only fluid uses of non-milk powder are so taxed?

2. Are the Plaintiffs correct in maintaining that the Secretary's rate of tax or penalty assessment, which in 1968 would have resulted in an extra order cost of $.10 per half gallon of "GO" and a total actual incurred cost of $.17 per half gallon of "GO" is a provision which prohibits or tends to prohibit the free entry of non-fat milk powder into the Central Arizona Milk Marketing Area?

3. Are the Plaintiffs correct in maintaining that the arbitrary method of arriving at class prices under the Order results in a price in excess of the Secretary's authority?

4. Are the Plaintiffs correct in maintaining that in view of Section 608c 5 (G) of Title 7 USC, and other applicable provisions of law, the Defendant may not place a condition on Sarival's exemption from market order payments on their fresh milk sales, to-wit: that they not receive, process or manufacture and sell "GO" and providing tolerance limits thereon?

5. Are the Plaintiffs correct in maintaining that the Secretary has no jurisdictional powers to price or tax, assess or equalize "GO" as a non-fresh milk product?

6. Are the Plaintiffs correct in maintaining that the hear-

ing and pre-hearing procedures of the Secretary are not in conformance with the Title 5 USC Sec. 554 et seq.?

7. Are the Plaintiffs correct in maintaining that the Secretary, in view of Title 7 USC 608c (11) which favors regional marketing orders, may not convene a national hearing, and promulgate an order for Central Arizona based on marketing conditions in other areas of the United States, and thereafter amend all orders identically including Central Arizona?

8. Are the Plaintiffs correct in maintaining that the findings set forth at 34 FR 16548 are not supported by substantial, reliable, probative evidence within the meaning of Title 5 USC Sec. 554 et seq.?

9. Are the Plaintiffs correct in maintaining that under Title 5 USC Sec. 554 et seq., the Secretary is not able to relieve the true proposer of the compensatory tax of his burden of proof by agreeing ex parte to adopt and publish the proposal as the Secretary's?

10. Are the Plaintiffs correct in maintaining that the Secretary's Decision and Final Order at 34 FR 16548 was not proper or legal as applied?

XXIII

PRAYER FOR RELIEF

The Plaintiffs pray for the following relief:

1. That the Court convene a Three-Judge Court to determine the matters in controversy herein, and preliminary thereto issue a stay of the effective date of the Final Order and Decision at 34 FR 16548 pendente lite until hearing on a stay, temporary injunction or restraining order pendente lite can be held and thereafter that a temporary stay, injunction or restraining order pendente

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like be issued restraining the effective date of 34 FR 16548 until Final Order and Judgment herein.

2. That the Court declare the rights of the Plaintiffs to be as alleged hereinbefore, and enter judgment therefor.

3. That the Court issue ancillary writs to such Declaratory Judgment as are necessary to prohibit the implementation of Title 7 USC 608c generally and as proposed at 34 FR 16548, and such other acts as are necessary to preserve the rights so declared.

4. That in addition to the foregoing and as separate relief the Court temporarily and permanently enjoin the Defendant from effectuating 34 FR 16548, or any similar order so providing, or taking any act or step to assert any jurisdiction over or make an assessment upon non-fat milk powder or "CO" pursuant to Title 7 USC 608c, or any other claimed authority.

5. That the Court grant such other further and different relief as to the Court seems just and proper.

STOCKTON & HING

By _____
Henderson Stockton
507 Security Building
Phoenix, Arizona 85004

HILL & SAVOY

By _____
John E. Savoy
34 W. Monroe
Phoenix, Arizona 85003

Appendix D — Complaint.

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss:

MARLENE L. KRESSE, being first duly sworn, upon her oath, deposes and says:

That she is one of the Plaintiffs in the foregoing Complaint, that she makes this verification in her own behalf and for and on behalf of the other Plaintiffs, being first duly authorized so to do.

That she has read the said Complaint and knows the contents thereof, and that the same are true to her own knowledge except as to those matters therein stated on information and belief which matters she believes to be true.

Marlene L. Kresse
MARLENE L. KRESSE

SUBSCRIBED AND SWORN TO before me this the 13th day of November, 1969.

Notary Public

My commission expires:
Feb. 14, 1972

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See:

Final Decision,
34 FR 16548, No. 199

Decision on Proposed Amendments,
34 FR 16881, No. 201

Title 7, Agriculture, Order Amending Order,
34 FR 17428

Appendix D — Complaint.

Exhibit B — Affidavit of Marlene L. Kresse attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",

Plaintiffs,

vs.

CLIFFORD HARDIN, Secretary of Agriculture of the United States,

Defendant.

CIVIL ACTION #_____

AFFIDAVIT

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss:

MARLENE L. KRESSE, first being duly sworn, deposes and says:

1. That she is the President of Concerned Consumers, an unincorporated association of consumers who for a number of years has appeared at legislative hearings, circulated petitions and urged action on behalf of consumers by governmental and private groups. Concerned Consumers is currently sponsoring your affiant on a public service radio program for consumer interests 30 minutes once a week on Radio Station KOY in which we advise consumers of their rights and where they need to be vigilant and take action. In addition, Concerned Consumers has sponsored the incorporation of Harbor House

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Exhibit B — Affidavit of Marlene L. Kresse attached to Complaint.

Inc., a non-profit organization to aid and assist juvenile delinquents and young victims of drugs, and is regularly so engaged in providing a home and rehabilitation for these persons.

2. That we are fully familar with "GO" manufacture and its ingredients, and desire the product. In my case I have been forbidden to consume fresh milk products by my doctor and can only use "GO". It is not practical for me to manufacture it myself and I have considered its availability of prime importance for my health. Further, the right of a consumer to buy a product containing ingredients we desire and whose sale is otherwise lawful is a fundamental right which we will lose on the effective date of the Final Order. We are as equally concerned financially for those of the consumers who desire the product "GO" but who could not afford the extra monies these assessments represent in the event the product were marketed even for a short time.

3. We are firmly and violently opposed to any taxing or assessing arrangement however sophisticated which results in taking money from one businessman and giving it directly to another since it weakens competition and sets the stage for monopoly and higher prices, depriving us of fair competition on a fair basis in the goods we buy and thereby tends to reduce the availability of goods and to enhance the price through restraint upon viable competition. Under present competitive conditions the loss of effective competition from Sarival will inevitably further a monopoly in milk and filled milk and unduly enhance the price.

4. We are equally concerned about the penalty tax or assessment formula of the Department which excludes from regulation margarine made from non-fat milk powder because if it were included,

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the margarine manufacturers would withdraw monies from the regulation scheme, but which regulation includes "CO" because as a fluid product money is paid into the fund on account of fluid "CO sales.

5. Unless assisted by the Courts, we, the consumers, are artificially and illegally deprived of a healthful product desired by our members and regularly purchased or will have to in fact pay tribute to fresh milk interests on each quart we buy. There are many poor and underprivileged in Phoenix to whom these items are a matter of necessary nutrition. Many of these people have long since ceased buying milk for their children because of price and "CO" is needed at a reasonable price to assure some wholesome nutrition.

6. That our rights as outlined above and as otherwise alleged have been lost, and more loss will occur unless a stay of the effective date is granted pendente lite and we request such a stay or restraining order at every stage of this proceeding until final determination of this action.

Further affiant sayeth not.

Marlene L. Kresse
MARLENE L. KRESSE

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this the 14th day of November 1969.

Notary Public

My commission expires:
Feb 14, 1972

Appendix D — Complaint.

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MAXINE L. KRESSE, DOROTHY GILBERT, [illegible] DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",	CIVIL ACTION #_____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

WILLIAM J. RASMUSSEN, first being duly sworn, deposes and says:

1. That he is the founder and sole owner of Sarival Guernsey Farms of Glendale, Arizona, hereinafter called "Sarival". The word "Sarival" herein used is synonymous with the name William J. Rasmussen.

2. That since 1955 Sarival has marketed a food drink made from manufactured, non-fat dried milk powder, vegetable fat, and Vitamins A and D, all of which ingredients currently originate from States wholly outside the State of Arizona, and Arizona water, under the name and style of "GO", to independent grocery stores in the Phoenix, Arizona area only. In turn "GO" is marketed by the stores

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

to Arizona consumers thereof only. "GO" is the only product so manufactured continuously which has been offered on the Arizona market. In 1968 we sold 1,194,000 half-gallons of "GO", and in 1969 due to a false and abusive publicity campaign against "GO" by the proponent of this tax and penalty assessment in which they falsely represented "GO" to contain saturated fats we sold 665,573 half-gallons of "GO" to November 1969 to grocery stores.

3. That "GO" is also manufactured and sold in chocolate form in which case vitamins are omitted and chocolate, sugar and stabilizer added.

4. That since 1965 heretofore "GO" has been marketed without interference from or regulation by the Secretary of Agriculture and without any penalty tax or assessment of any name or nature.

5. That since 1962, Sarival has also produced fresh milk from Guernsey cows owned by Sarival, and processed and distributed such milk in and about Phoenix, Arizona. In 1968 Sarival marketed 2,084,657 one-half gallons of milk, and in 1969 to November, 1969 1,764,647 half-gallons of milk.

6. That such fresh milk activities of Sarival heretofore have been exempt from Central Arizona, Order #131, covering Phoenix and Tucson, Arizona, by reason of the fact that Sarival distributes its <u>own</u> fresh milk direct to grocers who resell to consumers and thereby is an exempt producer-handler under Central Arizona Milk Order 7 CFR 1131. As an exempt producer-handler Sarival files reports with the Market Administrator, a deputy of the Secretary, but makes no payments to the regulatory scheme on account of such activities. This status will be continued under the Final Order provided we do not make "GO". If we make "GO" we will be assessed on our own fresh milk in addition to the tax and penalty assessment on

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

"GO".

7. That none of the fresh milk produced and sold by Sarival is used in any form in "GO". The manufacture and sale of "GO" is as separate products in separate packages and labeling listing the different ingredients. We have surveys showing consumers recognize "GO" as a beverage drink separate from other drinks and that it competes with coffee, tea, fruit drinks, soft drinks, and non-fat milk powder, to a greater extent than it does with milk. One of these surveys is in the hearing record at pages 1519 to 1562. I have personally observed such sales patterns as well. No other similar survey was offered in evidence by any party, and the Final Decision and Order must be otherwise based upon opinion evidence of those who seek to receive the monies assessed, and those retained by such persons.

8. That the regulatory status of "GO" has been under a cloud since December 4, 1965 (31 FR 16277) when the Secretary first published a proposal to regulate the product which culminated in the Final Order and Decision effective December 1, 1969. The matter has taken almost three years to be processed through the Department during which time the marketing of the product and our ability to plan for our business has been severely limited. The present Final Decision further worsens the situation and makes it even more difficult to know how to plan for our business and service our customers.

9. That the costs set forth in the Smilow affidavit are correct and will represent more than 40% of the sale price of the product. The consumers will have to bear the largest share of the charge because even the entire profit margins involved are not

Exhibit C — Affidavit of William J. Rasmussen attached to Complaint.

enough to make more than a small contribution to such charges.

10. The Plaintiffs and grocers are threatened with the loss of the product "GO", the only one of its kind on the market, because such a large retail price rise may reduce sales volume to an impermissable level. We have this subject under current evaluation.

11. The "GO" retail market is a specialty market and contains many persons who desire the sole use of non-fat milk powder in a product for convenience, health and other reasons, and the service of this portion of the market enables us and the grocers to maintain our competitive position. Thus, there will be and can be no use made of the fresh milk surplus supplies for which compensatory payment is demanded in the Final Decision and Order. Therefore, absolutely no benefit is derived from the payments to us, the grocers or the consumers.

12. We understand the Secretary to maintain that we are free to buy non-fat milk powder or not for "GO". The tax and economic penalties he has erected will beyond any question result in reduced "GO" sales and the quantities of our non-fat milk powder purchases, and may well force us to cease them altogether. Accordingly, we interpret this decision as leaving us no real choice at all, and to us it says we are required not to buy manufactured non-fat dried milk powder from other States for use in "GO", and that we can not make "GO" and expect to remain in the marketplace.

13. That I have read the Smilow affidavit and adopt it as my own.

14. I support the request for stay as absolutely necessary

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to preserve the status quo and avoid irreparable harm.

Further affiant sayeth not.

WILLIAM J. RASMUSSEN

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this the 17th day of November, 1969.

Notary Public

My commission expires:
Feb. 14, 1972

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Exhibit D — Affidavit of Abe D. Smilow attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARLENE L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON MASON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",	CIVIL ACTION #_____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

ABE D. SMILOW, first being duly sworn, deposes and says:

1. That he was a member of the Federal Arizona Milk Marketing offices staff for ten (10) years administering the Arizona Federal Order as a principal auditor, and prior thereto was a principal auditor of the New York-New Jersey Federal Milk Marketing Order for 15 years, and is fully familiar with the operation of the said Arizona Order and is fully familiar with the Final Decision and Order complained of by the parties, (34 FR 16548) and has been and is now engaged as a dairy marketing consultant on Federal Milk Marketing Matters.

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2. That Central Arizona Milk Marketing Order 7 CFR 1131 provides for a type of milk market pooling known as an equalization pool. This is one of two types of pools which the Secretary is authorized to operate, the other being an individual handler pool. Under an individual handler pool each milk dealer is required to pay an equal fixed price to his producers only. He makes no payments of any kind to the Milk Marketing Administrator.

3. Under the Arizona equalization pool, payments are required to be made by fluid milk dealers into a fund administered by the Milk Market Administrator, a designated agent of the Secretary for such purposes. These monies are then paid over by the Milk Market Administrator to manufacturing milk dealers. These payments are in essence a subsidy for manufacturers of milk products to reimburse them for monies required to be paid producers. In Central Arizona some of these milk manufacturers are Carnation Milk Company, the United Dairymen of Arizona, a cooperative of milk farmers, and Shamrock Dairies.

4. Under an equalization pool such as Central Arizona's, payments to the Market Administrator are of two essential types. One is a payment on account of fresh milk directly received from farmers regularly supplying the area, and the other is a payment on account of fresh milk received from other sources than farmers regularly supplying the area, and on these supplies the payment is made on a compensatory basis, as if the product had

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indeed been supplied by a regular fresh milk supplier to the market.

5. The Final Decision and Order at 34 FR 16548 subjects "GO", a vegetable fat drink made from out of state, nonfat milk powder to a compensatory assessment, based upon the fluid volume of the completed product, and requires the Market Administrator's equalization plan to be paid for "GO" sales at the rate of the differential between the highest and lowest prices fixed under the order times the volume of "GO" sales.

6. The Final Decision and Order provides a penalty for these supplies being brought into the market as opposed to fresh milk products produced for the market. This occurs by using a larger assessment figure for "GO" nonfat powder than the fresh skim milk products usually associated with the market.

7. Attached hereto is a schedule showing the computation of the sums that would have been due from "GO" in 1968, and 1969 if the contested Order had been effective then. These figures fairly reflect the future impact of the contested Order if not stayed. This schedule further shows that it is greatly more expensive to make filled milk from nonfat milk powder than fresh skim milk, and I have so advised Mr. Rasmussen.

8. The equalization scheme of the Arizona Order as proposed to be amended by the Final Decision and Order will not return the monies paid by consumers and Sarival to the milk producers who produced the milk utilized in the nonfat milk powder.

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These monies will be paid to Arizona fresh milk producers only.

9. The case of Lehigh Valley Cooperative Farmers, Inc. vs. Freeman, 370 U.S. 76, also dealing with equalization compensatory payments at the rate of the difference between surplus price and fluid price contains an excellent discussion of a plan essentially similar to Central Arizona.

10. Since Sarival does not engage in milk manufacturing, it will not receive any monies or credits from the equalization pool. Since "GO" is manufactured from nonfat dry milk powder and not fresh milk, there is no benefit to Sarival or the consumers or grocers from participating in the equalization pool which is essentially for the purpose of providing surplus fresh milk on a stand-by basis and providing a means to equalize the cost. This fresh milk is not used by Sarival who is the only seller in Central Arizona of a vegetable fat drink made wholly from nonfat milk powder and vegetable fat. All others use fresh milk, and have done so during many years prior to the regulation or proposal contested herein.

11. The volume of "GO" sales, when included in the fresh milk regulatory scheme, amounts to approximately one-third (1/3) of one (1%) per cent of the total volume. The inclusion of such a small amount in the regulatory scheme could not affect at all the fixed or blend price which is required to be paid producers.

12. The Final Decision, while it includes in regulation sales of "GO", does not include in regulation nonfat milk powder

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used for manufacturing purposes such as margarine, cakes, pies or other non-fluid uses. Were these uses to be included, the manufacturer would be entitled to a credit and/or withdrawal of monies to the extent that such nonfat milk products were so utilized.

13. That the monetary reserve of the Market Administrator is currently not large enough to insure payment of contingent obligations and those that will accrue hereunder.

Further affiant sayeth not.

Abe D. Smilow

ABE D. SMILOW

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this 17 day of November, 1969.

Constance F. Hart

NOTARY PUBLIC

My commission expires:

Feb. 14, 1972

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SCHEDULE

I

While payments are made monthly under the order plan, the figures below fairly illustrate the relationships although based on annual averages. The following figures based upon the published figures of the Milk Market Administrator contained in the October 1969 price bulletin. This bulletin shows historical prices, and is attached hereto. The volumes stated are based upon Market Administration reports filed by Sarival.

1968:

1. 1,194,000 half-gal. of "GO" sold x $.0954[(1)] per half-gal. proposed penalty tax and assessment = $113,907.60

2. 2,084,657 half gal. of own farm produced fresh milk sold x $.0236[(2)] per half gal. penalty for manufacture of "GO" assessed on own farm milk = $49,197.91

Fnt. 1. $3.56 per cwt. Fluid Class I Skim Order fixed price.[A]
1.34 " " Class III Skim surplus Order fixed price[B]
$2.22 Class I-Class III Differential
23.25 half-gal. per cwt. = .0954 per half-gal.

2. $6.71 per cwt. Class I Whole Milk Price
6.16 producer price blended per cwt.
$ .55 per cwt. - $23.25 half-gal. per cwt. = $.0226

A. $6.71 per cwt. Class I whole Milk Price less
3.15 " " value of butterfat not in skim milk
$3.56 Skim Class I

B. $4.03 per cwt. whole milk surplus use price fixed by order
2.69 per cwt. value of butterfat removed
$1.34 skim milk value of order fixed price

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II

1969 TO NOV. 1, 1969

1. 655,573 half-gals. of "GO" sales x $.0976[3] per half-gal. = $64,959.92.

2. 1,764,647 half-gals. of own farm produced fresh milk sold x .0314[4] per half-gal. = $55,409.91

Fnt. 3 - $3.72 Fluid Class I Skim Order fixed price.[A]
1.45 Class III Skim surplus order fixed price.[B]
$2.27 Class I - Class III differential by 23.25 half - gal. per cwt. = $.0976.

A - $6.87 Whole milk fixed price per cwt.
-3.15 value of butterfat removed to make skim per cwt.
$3.72 Fluid Skim Class I Order fixed price.

B - $4.14 order fixed price for Class III surplus whole milk
-2.69 butterfat value removed to make skim
$1.45 Class III Skim differential per cwt.

Fnt. 4 - $6.87 Class I price whole milk per cwt.
6.14 Order fixed price for producers per cwt.
$ .73 Class I Blend Differential per cwt. ÷ 23.25 per cwt. = $.0314 per half-gal.

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III

THE COMPETITIVE DISADVANTAGE TO SARIVAL IN THE USE OF NON-FAT DRY MILK POWDER AS OPPOSED TO USE OF FRESH SKIM MILK IS ILLUSTRATED BELOW: (1)

1968

$2.30	F.O.B. cost of milk powder per fluid cwt. (2)
2.22	Compensatory tax and penalty assessment on "GO" (3)
.93	Cost of loss of exemption on fresh milk sales on account of sales of "GO" ratioed in to half-gal. of "GO" sales (4)
.30	Cost to bring powder to fluid state (5)
$5.75	Total cost to Sarival
-3.56	Cost if fresh skim milk is used rather than powder (6)
$2.19	Total increased cost of powder over fresh skim milk or $.094 per half-gal. of "GO".

Fnt. 1 - Figures in hundred weight.
" 2 - Fluid equivalent of $25.50 per cwt.
" 3 - See footnote - herein
" 4 - Equivalent of lbs. of "GO" sales divided by dollars of exemption value.
" 5 - Per Rasmussen estimate based on average costs for industry
" 6 - Class I Skim milk price

1969 ON SAME BASIS AS 1968:

$2.30	cost of powder at fluid equivalent
$2.27	Compensatory tax and assessment on powder
$1.86	Cost of loss of exemption on fresh milk sales by reason of selling "GO", ratioed in to volume of half-gal. "GO" sales.
.30	Cost to bring powder to fluid state
$6.73	

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III (Continued)

$6.73 -	(from page 8)
-3.72	Cost if fresh skim milk is used rather than powder
$3.01	Total increased cost of powder over fresh skim milk or $.13 per half-gallon of "GO".

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Year and Month	CLASS I PRICE: Basic Formula Price	Add	Supply-Demand Adj.	CLASS I MILK: Per 100 Lbs.	B.F. Diff.	CLASS II MILK: Per 100 Lbs.	B.F. Diff.	CLASS III MILK: Per 100 Lbs.	B.F. Diff.	PRODUCER PRICES: Per 100 Lbs.	B.F. Diff.
	dol.	dol.	cents	dol.	cents	dol.	cents	dol.	cents	dol.	cents
1965	3.26	2.30	- 2	5.34	8.1	3.37	6.9	3.12	6.9	5.00	7.8
1966	3.89	2.30	- 5	6.15	9.0	3.91	7.7	3.66	7.7	5.60	8.6
1967	4.10	2.43	- 8	6.45	9.0	4.07	7.6	3.82	7.6	5.81	8.6
1968											
Jan	4.05	2.50	-12	6.43 1/	9.1	4.06	7.6	3.81	7.6	5.98	8.7
Feb	4.05	2.50	- 9	6.46 1/	9.0	4.06	7.6	3.81	7.6	5.95	8.6
Mar	4.05	2.50	- 9	6.46 1/	9.0	4.06	7.6	3.81	7.6	5.89	8.6
Apr	4.05	2.50	- 6	6.49 1/	9.0	4.26	7.6	4.01	7.6	5.86	8.6
May	4.33	2.50	0	6.83 2/	9.0	4.32	7.6	4.07	7.6	6.19	8.7
Jun	4.33	2.50	3/	6.83 2/	9.0	4.31	7.6	4.06	7.6	5.98	8.6
Jul	4.33	2.50	3/	6.83 2/	9.0	4.33	7.6	4.08	7.6	6.27	8.6
Aug	4.33	2.50	3/	6.83 2/	9.0	4.35	7.7	4.10	7.7	6.51	8.6
Sep	4.33	2.50	3/	6.83 2/	9.0	4.43	7.9	4.18	7.9	6.50	8.7
Oct	4.33	2.50	3/	6.83 2/	9.3	4.38	7.7	4.13	7.7	6.44	8.8
Nov	4.33	2.50	3/	6.83 2/	9.1	4.34	7.7	4.09	7.7	6.27	8.7
Dec	4.33	2.50	3/	6.83 2/	9.0	4.42	7.9	4.17	7.9	6.08	8.6
Avg	4.24	2.50	- 3	6.71	9.0	4.28	7.7	4.03	7.7	6.16	8.7
1969											
Jan	4.33	2.50	3/	6.83 2/	9.3	4.34	7.6	4.09	7.6	6.20	8.7
Feb	4.33	2.50	3/	6.83 2/	9.0	4.34	7.6	4.09	7.6	6.18	8.5
Mar	4.33	2.50	3/	6.83 2/	9.0	4.35	7.6	4.10	7.6	6.12	8.5
Apr	4.33	2.50	3/	6.83 2/	9.0	4.40	7.8	4.15	7.8	5.92	8.6
May	4.34	2.50	3/	6.84	9.1	4.40	7.8	4.15	7.8	5.91	8.7
Jun	4.37	2.50	3/	6.87	9.1	4.40	7.8	4.15	7.8	5.79	8.6
Jul	4.39	2.50	3/	6.89	9.1	4.40	7.8	4.15	7.8	6.09	8.7
Aug	4.41	2.50	3/	6.91	9.1	4.41	7.8	4.16	7.8	6.49	8.8
Sep	4.42	2.50	3/	6.92	9.2	4.49	8.0	4.24	8.0	6.61	8.9
Oct	4.49	2.50	3/	6.99	9.4						
				6.87	9.13			4.14	7.71	6.14	

1/ Order provided for basic price through April 1968, to be not less than $4.05 per hundredweight.

2/ Order provides for basic price to be not less than $4.33 per hundredweight.

3/ Supply-demand provision of the Order suspended June 1, 1968.

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Exhibit E — Affidavit of Kwong Tang attached to Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[illegible] L. KRESSE, DOROTHY GILBERT, MURIEL DONALDSON, DONALD PARKER, SHARON WILSON, STEVE JUHAROS, Individually and as Officers and Members of Concerned Consumers, an unincorporated association, and on behalf of the class of purchasers and consumers of "GO", a class too large to name individually; and BARBARA BUCK, and PATRICIA RHYNE, consumers of "GO",	CIVIL ACTION #_____
Plaintiffs,	AFFIDAVIT
vs.	
CLIFFORD HARDIN, Secretary of Agriculture of the United States,	
Defendant.	

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss:

KWONG TANG, first being duly sworn, deposes and says:

1. That he is the owner and operator of a grocery store known as Tang's #2, located in Glendale, Arizona.

2. That he is an independent, non-chain store whose business is a site wholly within the Northwest Phoenix area. We compete at retail with large inter-state grocery chains, some of whose stock is listed on national exchanges, who do not sell "GO". Therefore, "GO" is an important competitive item for us.

3. That for many years I have been marketing "GO" to consumers buying from my store. "GO" has been a highly popular item,

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at times the most popular item, and the availability to me of such an item is an important element in attracting and holding customers not only for "GO" but for other grocery items. My milk sales have not only not been affected by "GO" sales but have risen considerably since I introduced "GO". Many customers previously buying milk powder appreciate the convenience of buying that product in a tasty, ready for consumption form.

4. That from my conversations with customers and observation of their shopping habits I am convinced that there is little confusion between milk and "GO". I very frequently see both items in the grocery cart, and many customers state they buy milk for the children and "GO" for themselves. Many have an aversion or fear of animal fats and some have been so advised by doctors, yet they dislike the bland quality of skim milk drinks.

5. That I am adamantly opposed to any tax or penalty assessment or charge of any kind being placed on the manufacturer of "GO" and certainly the size of the one proposed is highly objectionable. The amount of such charge is shown by the Smilow affidavit and is far beyond our margin so that most of the charge will have to be passed on to the consumer. In my experience as a grocer, I know a charge like this imposed in a very cost-conscious consumer market will seriously hurt "GO" sales and our sales of related items will fall and our ability to effectively compete will be reduced, in-

Appendix D — Complaint.

Exhibit E — Affidavit of Kwong Tang attached to Complaint.

creasing our operating costs on an overall basis.

KWONG TANG

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County of Maricopa, State of Arizona, this the 17 day of November 1969.

Notary Public

My commission expires:

Feb. 14, 1972

Appendix E — Letters.

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE

WASHINGTON, D. C. 20250

September 9, 1969

Mrs. Marlene L. Kresse, President
Concerned Consumers
P. O. Box 1332
Scottsdale, Arizona 85252

Dear Mrs. Kresse:

We received your exceptions to the revised recommended decision on amendments to the Central Arizona milk order in which you request an additional extension of time so that you may file a petition requesting an investigation.

We are sorry that you did not receive a copy of the revised recommended decision when it was issued. Its issuance was well publicized, however, as is evident from the exceptions which have been filed by other persons who were not on the mailing list to receive copies of the document.

The revised recommended decision was issued on June 17 and appeared in the Federal Register on July 15. Exceptions were originally due on August 4, but at the request of interested parties the time was extended to September 4. Under the circumstances and in the interest of other parties to the proceeding, we cannot grant your request for an additional 30-day extension of the time for filing exceptions.

We wish to point out to you that your exceptions which indicate your opposition to the proposed amendments and those filed by other consumers have become a part of the official record and will be considered in arriving at a final decision in this matter.

In this connection, you should be aware that the exceptions to the original recommended decision which you filed in October 1967 are likewise a part of the official record in this proceeding and must also be considered in drafting the final decision.

We have communicated with our market administrator whose address is 2617 North 24th Street, Phoenix, Arizona 85008, and you may now be assured that you are on the mailing list to receive any future notices of hearings and notices of recommended and final decisions on matters concerning the Central Arizona milk order.

We appreciate very much your personal interest and your interest on behalf of Concerned Consumers.

Sincerely,

JOHN C. BLUM

John C. Blum
Deputy Administrator
Regulatory Programs

Appendix E — Letters.

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
WASHINGTON, D. C. 20250

September 29, 1969

Miss Marlene L. Kresse, President
Concerned Consumers
P. O. Box 1332
Scottsdale, Arizona 85252

Dear Miss Kresse:

President Nixon has forwarded your letter of September 12, including 2,200 signatures to a petition requesting immediate action to thoroughly investigate the entire filled (or reconstituted) milk controversy in the Central Arizona milk market. The President is disappointed that the demands on his time make it impossible to reply personally to your expression of good wishes and guidance.

The Deputy Director of the Dairy Division in his letter of September 24 to you noted that the issue of "filled milk" is now involved in rule-making procedure. We are thus unable at this point to discuss the merits of the points at issue.

We desire, however, to make clear that the procedures authorized by law (Agricultural Marketing Agreement Act of 1937, as amended) and the rules of practice and procedure governing the formulation of marketing agreements and marketing orders (CFR 900) have been, and will continue to be followed, until final action on the issues before us has been completed. Copies of the Act and the Department's rules and regulations referred to are enclosed.

The written statements received from you and many other members of Concerned Consumers have been made a part of the record upon which the Secretary will reach a final

decision on proposed amendments to the Central Arizona milk order, including those dealing with "filled milk."

You may be interested in the future actions we must take. The next step in our procedure is the issuance of a final decision. When this decision is issued, the Secretary is required to determine whether two-thirds or more of the producers approve or disapprove the amended order. If approved, a final amended order will be issued.

In the process of amending any Federal milk order, careful investigation of proposals to amend are made prior to the hearing. The public hearing process provides the facts and information upon which the Secretary must rely in carrying out the declared policy of the Act. The complete record includes not only the testimony presented at the hearing but also the briefs filed afterwards by interested parties and exceptions taken to the recommended decision.

This entire amendatory process is the method of investigating and dealing with marketing problems as provided by statute and administrative regulations. These procedures are being followed in the consideration of the proposed amendments to the Central Arizona order. Consequently, your request for additional investigation must be denied.

We welcome the views of consumers in these matters. In the more than thirty years of issuing and amending milk orders, we have received the views of individual consumers and organized consumer groups at many public hearings ... and have found them most helpful in carrying out our responsibilities.

We sincerely hope this letter and enclosures will assist in clarifying the procedures we must follow in amending Federal milk orders. Please be assured that the views expressed by Concerned Consumers in their exceptions,

already a part of the record before the Secretary, will be carefully considered in arriving at a final decision.

Sincerely,

JOHN C. BLUM

John C. Blum
Acting Administrator

2 Enclosures